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Supreme Court of the United States

October Term, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE; WILLIAM GIBSON, Doctor; FREDERICK CALHOUN JAMES, Bishop; HERBERT WILLIAMS, Reverend; WILLIE B. OWENS; SOUTH CAROLINA CONFERENCE OF THE NAACP BRANCHES; MICHAEL G. BURTON, as Executive Director on behalf of the Republican Party; WILLIAM P. COLLINS, III; EARLY COPELAND; WILLIAM PATRICK FLACK; FRANK E. GIBSON, III; NANCY D. HAWK; and GUS ROBERTS,

versus *Petitioners,*

DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina House of Representatives, and THE SOUTH CAROLINA SENATE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

LAUGHLIN MCDONALD
(*Counsel of Record*)
NEIL BRADLEY
MAHA ZAKI
CRISTINA CORREIA
American Civil Liberties Union Foundation, Inc.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP SPECIAL CONTRIBUTION FUND
4805 Mount Hope Drive
Baltimore, Maryland 21215-3297
(301) 358-8900

JOHN ROY HARPER II
P.O. Box 843
Columbia, South Carolina 29202
(803) 771-4723
Counsel for SRAC Petitioners

THOMAS R. GOTTSHALL
SINKLER & BOYD, P.A.
1426 Main Street
Suite 1200
Columbia, South Carolina 29201
(803) 779-3080
Counsel for Republican Party Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in rejecting, in conflict with the decisions of every other circuit, "catalyst" theory of causation in determining prevailing party status under 42 U.S.C. §§ 1973l(e) and 1988, and in ruling that petitioners were not entitled to a fee award because they did not secure "an enforceable judgment" against the defendants?

2. Whether the court of appeals erred in denying fees to petitioners, who secured an enforceable judgment against the defendants on their claim that special senate elections were subject to Section 5 of the Voting Rights Act, on the ground that the judgment was not "material?"

LIST OF ALL PARTIES BELOW

The caption contains the names of all parties to the proceedings in the court of appeals.

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The October 30, 1996 opinion of the court of appeals affirming the decision of the district court denying petitioners attorney's fees is unreported and appears in the appendix hereto, App. 1. The December 15, 1995 order of the district court is unreported and appears in the appendix hereto, App. 11.

JURISDICTION

The opinion of the court of appeals sought to be reviewed was entered on October 30, 1996. Jurisdiction to review on a writ of certiorari the opinion in question is conferred by 28 U.S.C. § 1254(1). This petition is being filed within 90 days after entry of the opinion of the court of appeals.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 42 U.S.C. § 1973l(e), which provides that:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

and, 42 U.S.C. § 1988, which provides that:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985,

> and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioners appeal the denial by the court below of attorney's fees and costs.[1] The court of appeals, rejecting the catalyst theory of causation adopted by all 11 of the other circuits which have considered the matter, held that petitioners were not prevailing parties, despite the fact that they secured both court ordered and subsequently legislative redistricting, because they had not secured "an enforceable judgment."

The facts in this case are not in dispute. The 1990 census showed that South Carolina's congressional and legislative districts were malapportioned. App. 4. The general assembly failed to pass any redistricting plans before the 1990-91 legislative session adjourned in June,

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[1] Petitioners, who were the plaintiffs/appellants below, are the Statewide Reapportionment Advisory Committee (an unincorporated association of private individuals and organizations in South Carolina), the South Carolina State Conference of NAACP Branches, and several African-American residents of the state (hereinafter collectively referred to as "SRAC"), and the executive director of the South Carolina Republican Party and several of its members (hereinafter "Republican Party").

1991. *Id.* The Republican Party filed its complaint on October 4, 1991, and SRAC filed its complaint on October 31, 1991. The law suits were an effort to break the legislative impasse and insure that elections would be held in a timely, constitutional manner. *Id.* Petitioners succeeded in all of these objectives.

Both the Republican Party and SRAC alleged that the existing congressional and legislative districts in South Carolina violated one person, one vote and diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. They requested the district court to order interim court ordered redistricting on the grounds that the general assembly had failed to redistrict during the 1991 legislative session, and that there was not enough time prior to the 1992 elections for the state to redistrict and comply with the preclearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. A three-judge court was constituted to hear the complaints pursuant to 28 U.S.C. § 2284, and the cases were consolidated for trial. App. 4.

The general assembly reconvened on January 14, 1992 and adopted redistricting plans for the senate and house. The governor vetoed the plans on January 29, 1992 on the ground that they did not comply with Section 2, and the vetoes were sustained. The senate and house passed separate bills for congressional redistricting but no plan was enacted by the general assembly. App. 4; *Burton v. Sheheen*, 793 F.Supp. 1329, 1339 (D.S.C. 1992) (prior decision of the district court), *vacated*, *SRAC v. Theodore*, 508 U.S. 968 (1993), and *Campbell v. Theodore*, 508 U.S. 968 (1993). After the governor's veto was sustained,

the court declared that the legislative process was deadlocked. App. 4. These cases were tried beginning in February, 1992. During the three week trial the parties submitted evidence probative of minority vote dilution and various remedial redistricting plans. App. 5.[2]

On May 1, 1992 the court issued an order concluding that none of the plans proposed by the parties fully satisfied constitutional and statutory mandates, and directed that court ordered legislative and congressional plans "shall be the lawful election districts for each of those bodies for the general elections scheduled for 1992, and for all subsequent elections until redistricting plans for those bodies are lawfully enacted by the South Carolina General Assembly." *Burton v. Sheheen*, 793 F.Supp. at 1369; App. 5.[3] The court's plans, which were put into effect as a result of the litigation initiated by petitioners, were used by the state for the 1992 elections for the senate, house, and Congress. Those elected, with the

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[2] At the senate phase of the trial, the Republican Party, SRAC, the senate, the lieutenant governor, and the governor presented plans for consideration by the court. Burton v. Sheheen, 793 F.Supp. at 1362. At the house phase of the trial, the Republican Party, SRAC, the house, the speaker of the house, and the governor presented proposed remedial plans. *Id.* at 1364 and n.72. At the congressional phase of trial the state defendants agreed with petitioners that a majority black congressional district could and should be drawn. *Id.* at 1368.

[3] The court's plan created ten majority black senate districts, compared to seven in the pre-existing plan, 23 majority black house districts, compared to 20 in the pre-existing plan, and, for the first time since Reconstruction, a majority black congressional district. Burton v. Sheheen, 793 F.Supp. at 1362, 1364 and n.72, and 1368.

exception of the senator from Senate District One, served out their full terms.

SRAC appealed the decision of the district court. It contended that the three judge court had not properly applied Section 2 in implementing its court ordered plans. *SRAC v. Theodore*, No. 92-155 (S.Ct.). The governor subsequently filed a similar appeal. *Campbell v. Theodore*, No. 92-219 (S.Ct.).

This Court vacated and remanded for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore*, 508 U.S. at 968. The Solicitor General's position was that the district court erred in failing to conduct a full Section 2 review of its plans "before imposing those plans for use in future elections." *SRAC v. Theodore*, No. 92-155, Brief for the United States as Amicus Curiae, p. 18. The Solicitor General, acknowledging the electoral time constraints the district court faced, did not question the court's decision "to impose its plans in their current form for purposes of the 1992 elections." *Id.*

On remand, the district court provided the state an opportunity to enact legislative redistricting plans. App. 5. The general assembly enacted a new plan for the house in February, 1994 which drew heavily upon the court ordered plan. App. 10. Following an initial objection and subsequent modification, the plan was precleared by the Attorney General under Section 5 on May 31, 1994. App. 6. The legislative plan for the house increased the number of majority black districts compared to the court ordered plan from 23 to 31. S.C. Act 415, May 19, 1994. Neither the

Republican party nor SRAC challenged the precleared house plan. On March 28, 1994 the general assembly passed a new congressional plan which made only slight changes in the court ordered plan and retained a majority black district. The plan was precleared by the Attorney General on April 28, 1994. App. 6, 14. Neither SRAC nor the Republican Party challenged the precleared congressional plan.

The 1994 elections for the house and Congress were held under the legislatively enacted plans. The next regular election for the senate was scheduled for 1996.

In July, 1994, the senate moved the court to allow the state to hold a special election to fill a vacancy in Senate District One using the lines in the court ordered plan. SRAC and the Republican Party opposed the motion on the grounds that the state's decision to conduct the special election using the court ordered lines was a legislative decision subject to preclearance under Section 5. The district court agreed and ruled that the proposed special election plan "must be submitted for preclearance under Section 5." Order, August 22, 1994, slip op. at 12; App. 5-6. The state made a submission which was approved on December 12, 1994.

In May, 1995 the state enacted a legislative plan for the senate which was based substantially on the court ordered plan. App. 10. The plan was submitted to the Attorney General and was precleared. App. 6. The legislative plan for the senate increased the number of majority black districts compared to the court ordered plan from ten to 11. S. 9, Ratification No. 667 (1995). Neither

the Republican party nor SRAC opposed the precleared senate plan.

SRAC and the Republican Party filed separate motions for costs and fees as prevailing parties pursuant to 42 U.S.C. §§ 1973l(e) and 1988. The motions were denied by the district court and the denial was affirmed *per curiam* by the court of appeals. App. 8.

A. The Decision of the Court of Appeals.

The court of appeals, relying upon *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994) (*en banc*), rejected "'catalyst' analysis of causation in determining prevailing party status," and held that petitioners were not prevailing parties because they "were not entitled to enforce any judgment against the defendants." App. 7-8. According to the court of appeals, "neither the district court's vacated judgment, nor the Supreme Court's decision to remand to the district court for further consideration in light of the Solicitor General's brief constitutes an enforceable judgment against the defendants." App. 8.[4]

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[4] In *S-1 and S-2*, 21 F.3d at 51, the *en banc* court adopted the dissenting panel opinion of Judge Wilkinson in *S-1 and S-2*, 6 F.3d 160, 172 (4th Cir. 1993), in which he interpreted Farrar v. Hobby, 113 S.Ct. 566 (1992), as rejecting the catalyst theory of prevailing party status. Six members of the *en banc* court adopted the panel majority opinion, which noted that the Court in *Farrar* "never mentioned the catalyst theory, and the passage upon which the State relies occurs, as dicta, in a general discussion of 'prevailing party' status." 6 F.3d at 167.

Although petitioners secured an enforceable judgment against the defendants on their claim that special senate elections were required to be precleared under Section 5, the court of appeals denied a fee award for that portion of the litigation on the ground that petitioners' success "does not represent a 'material alteration in the relationship between the parties.' " App. 8.

In a concurring opinion, Judge Motz acknowledged that petitioners were "the 'catalyst' " for the action taken by the district court and subsequently the legislature. App. 10.

> SRAC and the Republican Party advance the classic 'but for' scenario: had it not been for the filing of their complaints in the district court, the court would not have intervened in the reapportionment process. Without such intervention, the South Carolina General Assembly would not have adopted a scheme that drew heavily from that judicially-crafted plan.

Id. Judge Motz joined the judgment because she was obligated to follow *S-1 and S-2*. App. 9 ("[n]o panel can refuse to follow a circuit precedent . . . established by the entire court sitting en banc"). She expressed doubt, however, that *Farrar v. Hobby*, 113 S.Ct. 566 (1992), required the same outcome, noting that the Fourth Circuit's "conclusion that *Farrar dicta* eviscerated the catalyst analysis was contrary to the view of every other circuit to address the question," and that "[i]n the three years since the issuance of *S-1 and S-2* no circuit has followed our holding." App. 10.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted because the decision of the Court of Appeals for the Fourth Circuit for which review is sought is squarely and irreconcilably in conflict with the decisions of all 11 of the other circuits which have addressed the issue of whether catalyst theory of causation is sufficient to support an award of attorney's fees under 42 U.S.C. §§ 1973l(e) and 1988.[5]

The opinion below is also contrary to the decisions of this Court for determining prevailing party status.

A. There Is a Conflict Among the Circuits.

Catalyst theory justifying an award of fees "requires showing that the lawsuit is a causal link that prompted some remedial action." *Fields v. City of Tarpon Springs*, 721 F.2d 318, 321 (11th Cir. 1983). *See also Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978) ("[t]he key issue is the provocative role of the plaintiff's lawsuit"). Only the Fourth Circuit has rejected the catalyst theory.

In interpreting the fee statutes, catalyst theory has been applied by the following circuits:

First Circuit	*Nadeau v. Helgemoe*, 581 F.2d at 279 ("when plaintiff's lawsuit acts as a 'catalyst' in prompting defendants to take action to meet plaintiff's

[5] In Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983), the Court indicated that the standards for awarding fees under the two statutes are generally the same.

	claims, attorney's fees are justified despite the lack of judicial involvement in the result").
Second Circuit	*Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984) (plaintiffs may recover where the litigation was "a catalytic . . . factor" in obtaining relief).
Third Circuit	*Wheeler v. Towanda Area School District*, 950 F.2d 128, 132 (3d Cir. 1991) ("causation can be established through a 'catalyst' theory, where even though the litigation did not result in a favorable judgment, the pressure of the lawsuit was a material contributing factor in bringing about extra judicial relief").
Fifth Circuit	*Heath v. Brown*, 858 F.2d 1092, 1093 (5th Cir. 1988) (plaintiffs may recover where the litigation was a "significant catalyst in the abandonment of a policy which had been challenged as unconstitutional").
Sixth Circuit	*Perket v. Secretary of Health & Human Services*, 905 F.2d 129, 132 (6th Cir. 1990) (plaintiffs are prevailing parties who were a "catalyst" in prompting defendants to take action).

Seventh Circuit	*Dawson v. Patrick*, 600 F.2d 70, 79 (7th Cir. 1979) (applying "catalyst" analysis).
Eighth Circuit	*Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988) (approving "the catalyst approach").
Ninth Circuit	*Lads Trucking Co. v. Board of Trustees*, 777 F.2d 1371, 1375 (9th Cir. 1985) (fees may be awarded "even though there is no judgment on the merits").
Tenth Circuit	*Luethje v. Peavine School District*, 872 F.2d 352, 354 (10th Cir. 1989) ("it is enough [for a fee award] that plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act").
Eleventh Circuit	*Fields v. City of Tarpon Springs*, 721 F.2d at 321 ("[t]o determine if a party has prevailed when there is no judicial relief this circuit has used the catalyst test").
D.C. Circuit	*Public Citizen Health Research Group v. Young*, 909 F.2d 546, 549 (D.C.Cir. 1990) (plaintiffs may recover as prevailing parties if the litigation was a causal factor in obtaining the relief sought).

Prior to *S-1 and S-2*, the Fourth Circuit itself recognized and applied the catalyst rule. *See, e.g., Smith v.*

University of North Carolina, 632 F.2d 316, 347 (4th Cir. 1980) (fees are authorized where "a plaintiff's actions were a catalyst which caused a defendant to remedy his errant ways"); *DeMier v. Gondles*, 676 F.2d 92, 93 (4th Cir. 1982) ("a settlement, consent decree, or other resolution of the underlying dispute short of formal adjudication may still support an award of fees").

Although the Court in *Hewitt v. Helms*, 482 U.S. 755, 761, 763 (1987), did not reach the catalyst theory, it recognized that fees can be appropriately awarded when a plaintiff secures some of the relief sought "despite the absence of a formal judgment in his favor." And in *Maher v. Gagne*, 448 U.S. 122, 129 (1980), the Court held that "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that the plaintiff's rights have been violated." *See also* S.Rep. No. 1011, 94th Cong. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief").

Farrar did not, as the court of appeals held, reject the catalyst theory. Instead, the Court recognized that a plaintiff could be a prevailing party under two different circumstances. The first was where the plaintiff "obtain[ed] an enforceable judgment against the defendant." 113 S.Ct. at 573. The second was where the plaintiff obtained "relief through a consent decree or settlement." *Id.* (*citing Maher v. Gagne*, 448 U.S. at 129). The court of appeals improperly ignored, or considered

redundant, the second basis for determining prevailing party status identified by this Court.[6]

The circuits, moreover, have continued to apply the catalyst rule since this Court's decision in *Farrar*, frequently expressly rejecting the position taken in *S-1 and S-2*. *See, e.g.*:

First Circuit	*Paris v. HUD*, 988 F.2d 236, 241 (1st Cir. 1993) (holding post-*Farrar* that plaintiffs were prevailing parties under the "catalyst" theory).
Third Circuit	*Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 547 (3d Cir. 1994) ("[t]he view that the 'catalyst theory' was *sub silentio* abrogated in *Farrar* is incompatible with the Supreme Court's approach to attorney's fees under section 1988").
Fifth Circuit	*Craig v. Gregg County Texas*, 988 F.2d 18, 20-1 (5th Cir. 1993) (applying the catalyst test).

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[6] Had the Court intended to overrule or depart from its holding in *Maher* that "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that the plaintiff's rights have been violated," it would surely have said so. *See* Vasquez v. Hillery, 474 U.S. 254, 266 (1986) ("the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons").

Sixth Circuit	*Brown v. Local 58, IBEW*, 76 F.3d 762, 772 (6th Cir. 1996) (approving the catalyst formulation); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-58 (6th Cir. 1993) (plaintiffs were prevailing parties where defendants made voluntary changes plaintiffs sought by their lawsuit).
Seventh Circuit	*Zinn By Blankenship v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994) ("plaintiffs who attain the relief they seek through defendants' voluntary action may qualify for fees by way of the catalyst theory notwithstanding *Farrar*").
Eighth Circuit	*Little Rock School District v. Pulaski County Special School District, No. 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994) (*Farrar* does not affect "our foregoing [catalyst] analysis").
Ninth Circuit	*Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995) ("the catalyst test survives *Farrar*").
Tenth Circuit	*American Council of the Blind, Inc. v. Romer*, 992 F.2d 249, 251 (10th Cir. 1993) (*Farrar* does not condemn "use of the 'catalyst rule' "); *Beard v. Teska*, 31 F.3d 942, 951 (10th

Cir. 1994) (rejecting the argument that *Farrar* repudiated catalyst theory).

The conflict among the circuits here is not only patent, but as the concurring opinion of Judge Motz makes clear, it cannot be resolved except by the action of this Court. The petition should be granted. *See McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on this issue of statutory construction"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted "to resolve a conflict among the Circuits"); *United States v. Gaddis*, 424 U.S. 544, 547 (1976) (certiorari granted "because of the discordant views in the Circuits regarding the proper application" of prior Supreme Court decisions).

B. The Opinion Below Is in Conflict with the Decisions of this Court for Determining Prevailing Party Status.

Petitioners were not only the catalyst for judicial and legislative action, as Judge Motz found, App. 10, but their success in this case was exceptional. They succeeded in breaking through the legislative impasse and in invalidating the pre-existing malapportioned legislative and congressional districting plans. They secured declaratory and injunctive relief in the form of court ordered legislative and congressional redistricting. The court ordered plans were a substantial improvement over the pre-existing plans and increased in each instance the number of majority black districts. Appellants secured injunctive

relief insuring that legislative and congressional elections were held in a timely manner in 1992.

The SRAC petitioners prevailed in their appeal to the Supreme Court and secured an order vacating the decision of the district court and remanding for further consideration of petitioners' Section 2 claims. Petitioners also secured an injunction preventing the implementation of a special election for Senate District One absent Section 5 preclearance.

As a result of the litigation, the general assembly enacted legislative and congressional plans which complied with one person, one vote. Moreover, the legislative plans for the house and senate, from the standpoint of minority political participation, were an improvement even over the court ordered plans.

According to the precedents of this Court, plaintiffs are deemed prevailing parties within the meaning of the fee statutes, 42 U.S.C. §§ 1973l(e) and 1988, "'if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 784, 790 (1989), the Court reaffirmed the *Hensley* formulation and unanimously rejected the contention that plaintiffs must prevail on the "central issue" in a case and achieve the "primary relief sought" in the litigation to be deemed prevailing parties. The search for the "central" issue and "primary" relief, "much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988

and is essentially unhelpful in defining the term 'prevailing party.' " 489 U.S. at 791. Instead, "[a] prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought." 489 U.S. at 791. According to the Court, the central inquiry is whether there was a "material alteration of the legal relationship of the parties." 489 U.S. at 792-93. *Accord, Hewitt v. Helms,* 482 U.S. at 761 (a plaintiff is prevailing who settles "some dispute which affects the behavior of the defendant towards the plaintiff").

The *Hensley* standard, described by the Court as "a generous formulation," 461 U.S. at 433, is designed to effectuate the intent of Congress in enacting the fee statutes "to ensure 'effective access to the judicial process' for persons with civil rights grievances." 461 U.S. at 429. *Accord, Texas State Teachers Association,* 489 U.S. at 793 ("Congress meant to promote [the role of 'private attorney general'] in enacting the Civil Rights Attorney's Fees Awards Act of 1976"). Applying the legal standards required by *Hensley* and *Texas State Teachers Association,* and mindful of the underlying congressional purpose in enacting the fee statutes, petitioners were prevailing parties. They succeeded not merely on "any" significant issue that achieved "some" of the benefit sought in bringing suit, but they achieved essentially all of the basic goals of their litigation.

Farrar v. Hobby further supports an award in this case. *Farrar* was an action in which the plaintiffs sought $17 million in money damages. Instead, the jury gave them nothing; they recovered only nominal damages in the amount of $1.00. While the Court held they were prevailing parties, plaintiffs were not entitled to an award

of fees because their victory was purely "technical." 113 S.Ct. at 574. However, as Justice O'Connor held in her concurring opinion, "[n]ominal relief does not necessarily a nominal victory make." 113 S.Ct. at 578. Recognizing that the fee statute "is a tool that ensures the vindication of important rights, even when large sums of money are not a stake," a court's analysis should take into account "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served." 113 S.Ct. at 579 (O'Connor, J., concurring).

In *Farrar* there was no evidence of any "public purpose this litigation might have served." 113 S.Ct. at 578 (O'Connor, J., concurring). In this case, by contrast, the litigation directly served the very important public purposes of insuring that elections were held in a timely manner under fairly apportioned redistricting plans, and that legislatively enacted plans were implemented. Under *Farrar*, these factors weigh heavily in support of a fee award.

The court of appeals failed to apply the standards for prevailing party status adopted by the Court in *Hensley* and *Texas State Teachers Association*. The petition should be granted because the lower court decided a federal question in conflict with the applicable decisions of this Court. *Army & Airforce Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (granting certiorari where the decision below "appeared to be in conflict with our precedents").

C. Petitioners' Success on their Section 5 Claim Was not Immaterial.

The court of appeals acknowledged that petitioners prevailed on their claim that the special senate election was subject to Section 5 preclearance. It held, however, that the victory "does not represent a 'material alteration in the relationship between the parties' such as to merit treatment as a 'prevailing party.' " App. 8. The court's ruling is in conflict with the decisions of this Court which have recognized the importance of Section 5 in protecting minority voting rights, as well as the crucial role played by private enforcement, and the decisions of other federal courts which have awarded attorney's fees to plaintiffs who have secured compliance with the statute.[7]

The Court in *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), upheld the constitutionality of Section 5 because of the exceptional history of voting discrimination in the jurisdictions covered by the statute and the critical role of preclearance. The Court noted the "unremitting and ingenious defiance of the Constitution" in certain sections of the country, the failure of the case-by-case method to end discrimination, and the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" which Section 5 was designed to pretermit. *Id.* at 309, 335.

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[7] The actual time spent on the Section 5 issue was a small part of the total litigation. But that does not mean, as the court of appeals held, that securing compliance with Section 5 was immaterial.

The Court has also stressed the importance of private enforcement of the Act, particularly Section 5. In *Allen v. State Board of Elections*, 393 U.S. 544, 554-57 (1969), the Court inferred a private cause of action to enforce Section 5 based on the Act's objective of protecting minority citizens from discrimination in voting, concluding that "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." 393 U.S. at 556.

In its 1975 amendments of the Act, Congress made explicit its intent that private citizens could enforce Section 5; it provided that every time "Attorney General" appeared in Section 3, the "pocket trigger," the words "Attorney General or any aggrieved person" should be substituted. 42 U.S.C. § 1973a(c); S.Rep. No. 295, 94th Cong., 1st Sess. 40 (1975) *reprinted in* 1975 U.S.C.C.A.N. 774, 807 ("it is sound policy to authorize private remedies to assist the process of enforcing voting rights"). The Senate report explained that in voting rights cases "Congress depends heavily upon private citizens to enforce the fundamental rights involved." S.Rep. No. 295 at 40. *See also Chisom v. Roemer*, 501 U.S. 380 (1991) (private action to enforce Section 2); *Morse v. Republican Party of Virginia*, 116 S.Ct. 1186, 1213 (1996) (recognizing a private cause of action to enforce Section 10 of the Act, 42 U.S.C. § 1973h).[8]

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[8] Private enforcement has proved indispensable to the effective implementation of the Act since its passage. *See* Chandler Davidson & Bernard Grofman, "The Voting Rights Act and the Second Reconstruction," in Quiet Revolution in the

Congress has extended Section 5 three times since its enactment in 1965 – in 1970, 1975, and in 1982. In the 1982 extension, Congress indicated that the gains in minority political participation "are fragile," and that "[w]ithout the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices." S.Rep. No. 417, 97th Cong., 2d Sess. 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187. The Senate report noted the "virtual unanimity among those who have studied the record that Section 5 preclearance should be extended." *Id.* at 9 and 186.

In light of the strong congressional commitment to Section 5 preclearance, the statute's function in protecting minority voting rights, and the central role played by private enforcement in effectuating the Act's purposes, the court of appeals erred in concluding that petitioners' successful efforts in securing compliance with the statute were not "material."

When it extended Section 5 in 1975, Congress also amended the Act to authorize "a reasonable attorney's fee as part of the costs" to the prevailing party. 42 U.S.C. § 1973l(e). According to the Senate report, "[f]ee awards are a necessary means of enabling private citizens to vindicate these Federal [voting rights]." S.Rep. No. 295 at 40. To deny fees to a prevailing party, as here, would not only be contrary to the intent of Congress, but would improperly cast the burdens of litigation and delay upon

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South: The Impact of the Voting Rights Act, 1965-1990, 385 (Chandler Davidson & Bernard Grofman eds., 1994) (the private bar has had "a major role in enforcing public voting rights law . . . [t]his fact cannot be emphasized too strongly").

the victims of possibly discriminatory practices. *South Carolina v. Katzenbach*, 383 U.S. at 328.

Other lower federal courts, recognizing the importance of Section 5 enforcement, have awarded attorney's fees to plaintiffs who secured compliance with the statute even when the voting change was determined not to injure minority voting rights. In *Maloney v. City of Marietta*, 822 F.2d 1023 (11th Cir. 1987), the plaintiff was deemed a prevailing party entitled to a fee award because he succeeded in his action to require the city to comply with Section 5 in using an unprecleared ward residency requirement. Although the Attorney General precleared the requirement, the court awarded fees because the legislative history and the decisions of this Court provided that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 822 F.2d at 1026, *quoting* S.Rep. No. 295 at 40, 1975 U.S.C.C.A.N. at 807, and *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1986).

The court also concluded in *Maloney* that the plaintiff had protected important rights "guaranteed under the [Voting Rights] Act." *Id.*

> By enacting the Voting Rights Act and subsequent amendments, Congress has evidenced its determination that compliance with the Act's provisions is of importance in protecting minority race participation in government and government's response to the legitimate interests of minority citizens. Where there has been noncompliance, the actor whose litigation brings about compliance has protected important civil rights of minorities.

822 F.2d at 1026 n.5. *See also Arriola v. Harville*, 781 F.2d 506, 512 (5th Cir. 1986) (plaintiffs entitled to fees for securing an injunction against use of an unprecleared voting practice); *Brooks v. Georgia State Board of Elections*, 997 F.2d 857 (11th Cir. 1993) (awarding plaintiffs fees in successful effort to require state to submit new judgeships for preclearance); *Robinson v. Alabama State Department of Education*, 727 F.Supp. 1422, 1425 (M.D.Ala. 1989) ("fees for prevailing plaintiffs" are critical to Section 5 enforcement).

The decision of the court of appeals will weaken enforcement of the Voting Rights Act in all the jurisdictions located within the Fourth Circuit by making it more difficult for economically disadvantaged minorities to redress their grievances in the courts.[9] Further, it will undermine the private attorney general aspect of the fee statutes for other parties with important public issues. Such a result is at odds with the intent of Congress in enacting the fee statutes and of promoting the role of "private attorney general" in vindicating protected voting and other rights. *Texas State Teachers Association*, 489 U.S. at 793.

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[9] The states in the Fourth Circuit covered in whole or in part by Section 5 are Virginia, North Carolina, and South Carolina, states which Congress specifically found had histories of discrimination and "unremitting and ingenious defiance of the Constitution" in the area of voting rights. South Carolina v. Katzenbach, 383 U.S. at 309-10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAUGHLIN MCDONALD
(*Counsel of Record*)
NEIL BRADLEY
MAHA ZAKI
CRISTINA CORREIA
American Civil Liberties Union Foundation, Inc.
4 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP Special Contribution Fund
4805 Mount Hope Drive
Baltimore, Maryland 21215-3297
(301) 358-8900

JOHN ROY HARPER II
P. O. Box 843
Columbia, South Carolina 29202
(803) 771-4723
Counsel for SRAC Petitioners

THOMAS R. GOTTSHALL
SINKLER & BOYD, P.A.
1426 Main Street, Suite 1200
Columbia, South Carolina 29201
(803) 779-3080
Counsel for Republican Party Petitioners

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE; WILLIAM GIBSON, Doctor; FREDERICK CALHOUN JAMES, Bishop; HERBERT WILLIAMS, Reverend; Willie B. Owens; South Carolina Conference of the NAACP Branches, *Plaintiffs-Appellants,* v. DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina House of Representatives, *Defendants-Appellees,* THE SOUTH CAROLINA SENATE, *Intervenor.*	No. 96-1086

MICHAEL G. BURTON, as Executive Director on behalf of the Republican Party; WILLIAM P. COLLINS, III; EARL COPELAND; WILLIAM PATRICK FLACK; FRANK E. GIBSON, III; NANCY D. HAWK; GUS ROBERTS,

Plaintiffs-Appellants,

v.

DAVID M. BEASLEY, in his official capacity as Governor of South Carolina; DAVID H. WILKINS, in his official capacity as Speaker of the South Carolina House of Representatives,

Defendants-Appellees,

THE SOUTH CAROLINA SENATE,

Intervenor.

No. 96-1099

Appeals from the United States District Court of South Carolina, at Columbia.
Clyde H. Hamilton, Circuit Judge; G. Ross Anderson, Jr., District Judge; Falcon B. Hawkins, Senior District Judge.
(CA-91-3310-3, CA-91-2983-3)

Argued: September 24, 1996

Decided: October 30, 1996

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published per curiam opinion. Judge Niemeyer and Judge Motz wrote concurring opinions.

COUNSEL

ARGUED: Moffatt Laughlin McDonald, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., Atlanta, Georgia; Thomas Rush Gottshall, SINKLER & BOYD, P.A., Columbia, South Carolina, for Appellants. Kenneth Paul Woodington, Senior Assistant Attorney, General, Columbia, South Carolina, for Appellees. Fred Thompson, III, STOKES & THOMPSON, Charleston, South Carolina, for Intervenor. **ON BRIEF:** Dennis Courtland Hayes, Willie Abrams, NAACP SPECIAL CONTRIBUTION FUND, Baltimore, Maryland; John Roy Harper, II, Columbia, South Carolina, for Appellants. Charles Molony Condon, Attorney General, Treva G. Ashworth, Deputy Attorney General, Columbia, South Carolina, for Appellee Wilkins; Charles E. Carpenter, Jr., Frederick A. Crawford, Deborah M. Sheffield, RICHARDSON, PLOWDEN, GRIER & HOWSER, P.A., Columbia, South Carolina, for Appellee Beasley. Mark Packman, DICKSTEIN, SHAPIRO & MORIN, Washington, D.C.; Gedney Howe, III, Charleston, South Carolina, for Intervenor.

OPINION

PER CURIAM:

The Statewide Reapportionment Advisory Committee and the South Carolina Republican Party appeal the

denial of attorney's fees in this action brought pursuant to the Voting Rights Act. We affirm.

I.

In 1990, census figures indicated that congressional districts and state legislative districts were apportioned unconstitutionally. After the release of these figures, the South Carolina General Assembly established committees to craft new redistricting plans. Deliberations continued with no success prior to the adjournment of the legislative session in June, 1991.

On October 4, 1991, the South Carolina Republican Party instituted an action in federal court alleging that the existing plans were malapportioned and unconstitutional. The party sought a declaration that the legislative process was at an impasse, thereby allowing for judicial intervention. A few weeks later, the Statewide Reapportionment Advisory Committee ("SRAC"), an unincorporated association of private individuals and organizations, filed a similar suit. A three-judge court was constituted to hear the complaints pursuant to 28 U.S.C. § 2284, and the two cases were consolidated in November, 1991. *See Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992), *vacated, Statewide Reapportionment Comm. v. Theodore*, 508 U.S. 968 (1993), and *Campbell v. Theodore*, 508 U.S. 968 (1993).

In January 1992, the South Carolina Governor, Carroll A. Campbell, Jr., vetoed the plans passed by the General Assembly, requesting a plan with more majority black districts. When no further action was taken by February 1992, the three-judge court declared a legislative impasse,

and allowed proceedings to go forward. After a three week trial, the court rejected redistricting plans submitted by all parties, and adopted its own plan. The State followed this plan during 1992 state elections.

SRAC, on one hand, and the Governor, on the other, appealed the court's decision. SRAC asserted, *inter alia*, that the court had not properly applied the analysis required by § 2 of the Voting Rights Act, 42 U.S.C. §§ 1973 *et seq.*, in implementing the plans. (A § 2 review calls on a court to "assess the impact of the contested [plan] on minority electoral opportunities." *Burton*, 793 F. Supp. at 1349, citing *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986)). In response to the SRAC appeal, the Supreme Court vacated the lower court's judgment and remanded the case for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore*, 508 U.S. 968 (1993). The Governor's appeal received an identical response. *Campbell v. Theodore*, 508 U.S. 968 (1993). Like SRAC, the Solicitor General had maintained that the three-judge court had failed to apply a proper § 2 analysis to the plans.

On remand, the three-judge court allowed the South Carolina General Assembly until August 1, 1995, to adopt state redistricting plans and preclear them with the Justice Department in accordance with the Voting Rights Act. Meanwhile, the Senate requested court approval to utilize the court-developed 1992 plans in a special October 1994 election for an open senatorial seat. SRAC and the Republican Party objected, arguing that these plans as well must be pre-cleared prior to their use in this election.

The court agreed with appellants and denied the Senate's motion.

By June 1995, the General Assembly had approved and pre-cleared plans for the reapportionment of both legislative houses as well as for congressional districts in the state. The court case was dismissed two months later. SRAC and the Republican Party subsequently moved for attorney's fees pursuant to 42 U.S.C. §§ 1973l(e) and 1988. The three-judge court denied that motion, and this appeal followed.

II.

The question for our review is whether SRAC and the Republican Party prevailed, as only prevailing parties are eligible for attorneys fees. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Supreme Court clarified the applicable standard:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff."

Id. at 111 (internal citations omitted).

This Court interpreted *Farrar*'s requirements in *S-1 and S-2 By and Through P-1 and P-2 v. State Bd. of Educ. of*

North Carolina, 6 F.3d 160 (4th Cir. 1993) (Wilkinson, J., dissenting), *vacated*, 21 F.3d 49, 51 (4th Cir.) (en banc) (adopting Judge Wilkinson's dissent as the majority opinion), *cert. denied*, 115 S.Ct. 205 (1994). There, parents of handicapped students brought an action, pursuant to 42 U.S.C. § 1983, against city and state officials for tuition reimbursement. The district court granted the plaintiffs summary judgment and the defendants appealed. *S-1 and S-2 v. Spangler*, 650 F. Supp. 1427 (M.D.N.C. 1986). After city officials agreed to reimburse tuition expenses, the parents continued to maintain their action against state officials. We held that the settlement with city officials mooted any action against state officials, and vacated the district court's grant of summary judgment to the plaintiffs against state officials. *S-1 and S-2*, 832 F.2d 294, 298 (4th Cir. 1987). On remand, the district court, recognizing the case's impact on state legislation, ordered that the state pay attorney's fees to the plaintiffs; a panel of this court affirmed. 6 F.3d 160.

Sitting en banc, a majority of this court reversed that decision. 21 F.3d 49. In doing so, the court rejected "catalyst" analysis of causation in determining prevailing party status. The court held that "[t]here is no way . . . that *Farrar* and a broad 'catalyst theory' of attorneys' fees recovery can be reconciled." 6 F.3d at 168-69 (Wilkinson, J., dissent) (adopted by majority opinion in *S-1 and S-2*, 21 F.3d at 51). Rather, the court concluded that the determinative factor would be a "material alteration of the legal relationship between the parties" as manifested by whether the plaintiff was entitled to enforce "a judgment, consent degree, or settlement against the defendant." *Id.* at 168-69 (quoting *Farrar*, 113 S.Ct. at 574).

Applying our holding in *S-1 and S-2* to the instant case, the court below determined that SRAC and the Republican Party did not meet the definition of "prevailing parties." Because the court's original decision was vacated by the Supreme Court, they were not entitled to enforce any judgment against the defendants. *Id.* at 169 ("[T]he judgment's vacatur on appeal renders it a legal nullity.").

We agree with the three-judge court's ruling. SRAC and the Republican Party fail to meet the standard set forth in *S-1 and S-2:* neither the district court's vacated judgement, nor the Supreme Court's decision to remand to the district court for further consideration in light of the Solicitor General's brief constitutes an enforceable judgment against the defendants. Similarly, the lower court's holding regarding preclearance of special election plans by the Justice Department does not represent a "material alteration in the relationship between the parties" such as to merit treatment as a "prevailing party." *Id.* at 168-69.*

Because SRAC and the Republican Party cannot establish that they meet the requirements set forth in *S-1 and S-2,* they are not entitled to attorney's fees.

AFFIRMED.

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* In passing, SRAC and the Republican Party suggest that an exception to *S-1 and S-2* be made for redistricting cases. But *S-1 and S-2* itself contains language rejecting such a carve-out. 6 F.3d at 169 n.2 (stating that a redistricting case, *Craig v. Gregg County,* 988 F.2d 18, 21 (5th Cir. 1993), "skirted the issue" as to the conflict between catalyst theory and *Farrar* and therefore was unpersuasive).

NIEMEYER, Circuit Judge, concurring:

To be a prevailing party in a legal action, a party must obtain relief in the action on the merits of his claim, *see Farrar v. Hobby*, 506 U.S. 103, 111 (1992), and not from some other process. The fee shifting statutes, such as 42 U.S.C. §§ 1973l(e) and 1988, reward successful *litigants*, not success in the political process even if the political success was a response to the litigation. Accordingly, in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.) (en banc) (adopting Judge Wilkinson's dissent at 6 F.3d 160 (4th Cir. 1993)), *cert. denied*, 115 S.Ct. 205 (1994), we rejected a broad catalyst theory for awarding attorneys fees to litigants simply because their position in litigation was vindicated by an external process or sequence of events outside of the litigation.

While I agree that *S-1 and S-2* requires us to affirm in this case, I believe the question of who prevailed, even when measuring the results obtained through the political process, is so unclear that whether we apply *S-1 and S-2* or evaluate who won in the political arena, I could not conclude that the district court abused its discretion in denying the appellants' attorneys fees.

DIANA GRIBBON MOTZ, Circuit Judge, concurring:

The parties have not established that they meet the "prevailing party" requirements of *S-1 and S-2*. No panel can refuse to follow a circuit precedent established by another panel, let alone one established by the entire court sitting en banc. Accordingly, I concur in the court's opinion and judgment.

I write separately only to indicate that I believe that the Supreme Court's holding in *Farrar* would not necessarily require the same outcome. I note that, when we issued *S-1 and S-2*, our conclusion that *Farrar dicta* eviscerated the catalyst analysis was contrary to the view of every other circuit to address the question. In the three years since the issuance of *S-1 and S-2* no circuit has followed our holding. Several have specifically disagreed with it. *See, e.g., Brown v. Local 58, IBEW*, 76 F.3d 762, 772 (6th Cir. 1996); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007 (9th Cir. 1995); *Zinn By Blankenship v. Shalala*, 35 F.3d 273, 275 (7th Cir. 1994). *See also Southeastern Fisheries Ass'n v. Chiles*, 876 F. Supp. 270, 271 (S.D. Fla. 1995).

Ironically, the "catalyst" analysis was devised to address cases like the one at hand. SRAC and the Republican Party advance the classic "but for" scenario: had it not been for the filing of their complaints in the district court, the court would not have intervened in the reapportionment process. Without such intervention, the South Carolina General Assembly would not have adopted a scheme that drew heavily from that judicially-crafted plan. Yet even if SRAC and the Republican Party did cause those results, *S-1 and S-2* forecloses this argument and requires that, without further ado, we conclude that they were not prevailing parties because they did not win an enforceable judgment against the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

MICHAEL G. BURTON, as Executive Director and on behalf of the Republican Party, *et al.*, Plaintiffs, vs. ROBERT J. SHEHEEN, in his representative capacity as Speaker of the South Carolina House of Representatives, *et al.*, Defendants, ROBIN TALLON, NEIL A. VANDER LINDEN, FORREST E. OTT, PHILIP T. JONES, ANN Y. HART, PEGGY A. DUFEK, GWENDOLYN L. GROOMS, THE SOUTH CAROLINA SENATE, THE DEMOCRATIC PARTY OF SOUTH CAROLINA, Defendant-Intervenors.	C/A No. 3:91-2983-1

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*, Plaintiffs, vs. CARROLL A. CAMPBELL, JR., *et al.*, Defendants.	C/A No. 3:91-3310-1 (Filed Dec. 15, 1995)

These matters are before the court on petitions of plaintiffs, the South Carolina Republican Party and the Statewide Reapportionment Advisory Committee (SRAC), for attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. For the reasons set forth below, the petitions are denied.

I

The facts of the underlying dispute are fully set forth in the court's order dated May 1, 1992. *See Burton v. Sheheen*, 793 F.Supp. 1329 (D.S.C. 1992), *vacated*, 113 S. Ct. 2954 (1993). To recapitulate briefly, the 1990 census figures, which were released in March of 1991, showed South Carolina's Senate, House, and congressional districts were unconstitutionally apportioned. From the point the census figures were released until the General Assembly adjourned *sine die* on June 6, 1991, both the Senate and the House wrestled, without success, to pass new redistricting plans. A concurrent resolution was introduced to extend the legislative session, but this resolution lacked the two-thirds majority needed for passage.

On October 4, 1991, the Republican Party instituted the underlying action claiming the existing Senate, House, and congressional plans were unconstitutionally apportioned. The Republican Party requested an injunction to prevent future use of those plans, a judicial determination that the redistricting process was at an impasse, and the adoption of the plans that it proposed.

On October 31, 1991, the SRAC filed a complaint substantially similar to the one filed by the Republican Party. The SRAC sought a judicial determination that the existing plans were unconstitutionally apportioned, that the existing plans could not be continued, and that the legislative process was at an impasse. In addition, the SRAC asked that its case be consolidated with the Republican Party's case. Consolidation was ordered November 13, 1991.

Shortly after reconvening on January 14, 1992, the General Assembly passed new Senate (S. 1003) and House (H. 3435) redistricting plans. These plans were vetoed by Governor Carroll A. Campbell, and the vetoes were upheld. The Governor's veto messages encouraged the General Assembly to draw more majority black districts in both S. 1003 and H. 3435 and to enhance the majority black districts which had been drawn in S. 1003. The General Assembly never passed a congressional plan.

No further plans were passed by the General Assembly. On February 10, 1992, the court convened a status conference at which all parties agreed that the legislative process was at an impasse with respect to redistricting. Pending motions were resolved and trial procedures were set. Trial ensued and the court ultimately fashioned its

own plans after concluding that "none of the plans proposed . . . fully comports with the objectives and criteria which should be incorporated in a judicially approved plan."

The SRAC appealed the court's order to the Supreme Court. The Court vacated the judgment of this court and remanded the case to this court for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore,* 113 S. Ct. 2954 (1993). Essentially, the Supreme Court wanted a § 2 analysis to be performed. However, the Supreme Court did not vacate the elections based on the court's plans. This court then afforded the "legislative process" of the State of South Carolina until August 1, 1995 to adopt and preclear a districting plan for the Senate.

Shortly thereafter, on February 2, 1994, the General Assembly passed H. 4333 Act #284 of 1994, which legislatively reapportioned the S.C. House of Representatives. That Act was not signed by the Governor but became law on February 15, 1994. On May 31, 1994, the plan received preclearance by the Department of Justice (DOJ).

On March 28, 1994, the General Assembly ratified H. 4332, which legislatively reapportioned the congressional districts in a slightly different manner than the court-drawn plan. H. 4332 became law on March 29, 1994 without the Governor's signature. On April 28, 1994, the congressional plan was precleared by the DOJ.

Also in 1994, the Lieutenant Governor ordered a special election to replace Senator Alexander S. Macaulay in Senate District One. Senator Macaulay's position

opened when he was elected to the South Carolina judiciary as a Circuit Judge by the General Assembly. On July 20, 1994, the Senate requested an order from this court directing the use of this court's 1992 district lines for use in the special election. The Republican Party and the SRAC, among others, asked this court to require the state to preclear the use of the 1992 plan with the DOJ. This court agreed and on August 22, 1994, ordered the plan to be submitted for preclearance under § 5 of the Voting Rights Act. The plan was submitted to the DOJ and was eventually precleared on December 12, 1994.

Subsequently, S. 9 Act #49 of 1995, which reapportioned the South Carolina Senate, passed both Houses on May 11, 1995. This Act became law on May 18, 1995 without the Governor's signature. The underlying plan was precleared by the DOJ on May 30, 1995.

Against this backdrop we are asked to award attorneys' fees to the Republican Party and the SRAC under 42 U.S.C. §§ 1973*l*(e) and 1988.

II

We first turn to the standards for determining when a plaintiff can be awarded attorneys' fees. Here, the plaintiffs have moved for attorneys' fees under 42 U.S.C. §§ 1973*l*(e) and 1988.[1] Because the statutes contain nearly

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[1] 42 U.S.C. § 1973*l*(e) states the following:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing

identical language and because the legislative intent was to have the same standards apply to both fee awards, this court shall construe the statutes similarly and shall apply the case law interpreting one statute to the other statute. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hastert v. Illinois State Bd. of Election Comm'rs*, 28 F.3d 1430, 1439 n.10 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 429 (1994); *Bly v. McLeod*, 605 F.2d 134, 138 (4th Cir. 1979) ("§§ 1973*l*(e) and 1988 are phrased in identical terms, and we apply the same rule of decision under both of them.") *cert. denied*, 445 U.S. 928 (1980).

"Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits." *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 572 (1992) (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (*per curiam*). " '[T]he fee applicant bears the burden of establishing entitlement to an award[,]' " and the district court has discretion in determining the amount of the fee award. *Alexander v. Mayor & Council*, 953 F.2d 160, 161 (4th Cir.1992) (quoting *Hensley*, 461 U.S. at 437). " 'This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding

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party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988, which was patterned in part upon § 1973*l*(e), similarly states the following:

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part the costs."

frequent appellate review of what are essentially factual matters.' " *Id.* (quoting *Hensley,* 461 U.S. at 437).

"[I]n order to qualify for attorney's fees under § 1988 [or § 1973*l*(e)], a plaintiff must be a 'prevailing party.' " *Farrar,* 113 S. Ct. at 572. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 792-793 (1989). "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." *Farrar,* 113 S. Ct. at 573 (citations omitted). It is "[o]nly under these circumstances [that] civil rights litigation effect[s] the material alteration of the legal relationship of the parties' and thereby transform[s] the plaintiff into a prevailing party." *Id.* at 573 (quoting *Garland,* 489 U.S. at 792-793).

If the plaintiffs are found to be prevailing parties, the issue of attorneys' fees must be considered. As a proviso, the court cautions that "a determination that a party has 'prevailed' . . . means only that fee claimants are eligible for attorneys' fees. The court must then consider whether a fee award would be 'unjust' under the particular circumstances." *Commissioners Court v. United States,* 683 F.2d 435, 442 (D.C. Cir. 1982). *See also Farrar,* 113 S. Ct. at 577 (O'Connor, J., concurring) (finding the fee award statutes "expressly grant[ ] district court's discretion to withhold attorney's fees from prevailing parties in appropriate circumstances"). Therefore, we will address the question of attorneys' fees only if the plaintiffs are found to be prevailing parties.

III

A

As an initial matter, we must determine the effect of *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir.) (*en banc*), *cert. denied*, 115 S. Ct. 205 (1994), on this case. We find that as a matter of law the plaintiffs cannot be considered prevailing parties because an enforceable judgment against the defendants no longer exists.

The plaintiffs initially obtained a judgment on the merits of their claims, *see Burton v. Sheheen*, 793 F.Supp. 1329 (D.S.C. 1992), but that judgment is no longer enforceable because the Supreme Court vacated it. *SRAC v. Theodore*, 113 S. Ct. 2954 (1993). "The judgment's vacatur on appeal renders it a legal nullity." *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 169 (4th Cir. 1993) (Wilkinson, J., dissenting), *vacated*, 21 F.3d 49, 51 (4th Cir.) (*en banc*) (adopting Judge Wilkinson's dissent as the majority opinion), *cert. denied*, 115 S.Ct. 205 (1994). But the result of the vacatur was somewhat less than clear. Although the Supreme Court vacated and remanded the judgment of this court, the Court neither vacated the lines drawn by this court nor the elections held pursuant to the 1992 plans. Nonetheless, after the Court's action, the plaintiffs could no longer enforce this court's initial order.

The Republican Party specifically claims that its lawsuit acted as a catalyst in bringing about redistricting. But in *S-1* the Fourth Circuit Court of Appeals rejected the catalyst theory as a means of determining who is a prevailing party. Significantly, the court found that " '[n]o material alteration of the legal relationship between the parties occurs *until* the plaintiff becomes entitled to

enforce a judgment, consent decree, or settlement against the defendant.' " *S-1*, 6 F.3d at 168 (Wilkinson, J., dissenting) (quoting *Farrar*, 113 S. Ct. at 574). Since no enforceable judgment, consent decree, or settlement exists against these defendants, we are precluded from finding that the plaintiffs are prevailing parties.

B

We, however, are aware that the Fourth Circuit's reasoning has not been shared by the other Circuit Courts of Appeals.[2] In light of this split of authority, we additionally find that the plaintiffs would not be entitled to attorneys' fees under any theory because their successes were only technical or *de minimis*.

As noted above, the Republican Party and the SRAC essentially sought four objectives: (1) a determination that the existing Senate, House, and congressional plans were unconstitutionally apportioned, (2) an injunction to prevent future employment of those plans, (3) a determination that the legislative process was at an impasse, and (4) adoption of the plans proposed by them for the three legislative bodies.

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[2] *See, e.g., Marbley v. Bane*, 57 F.3d 224, 233-35 (2nd Cir. 1995); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Zinn by Blakenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 544-50 (3rd Cir. 1994).

1

Issues (1) and (2) were conceded by the defendants through their answers to the complaint and, before that, through the establishment of both Senate and House subcommittees to draw new plans even before the 1990 census figures were released. Thus, the issue of whether the existing plans were constitutional was the issue never in dispute before this court. Further, this issue consumed virtually none of the court's time, in either the pre-trial or trial stages, and was effectively dealt with in the court's order by a footnote. *See Burton*, 793 F.Supp. at 1336 n.2. It cannot be credibly asserted that the underlying litigation resulted from a dispute over the viability of the existing plans. Similarly, since all parties agreed the existing plans were unconstitutionally apportioned, it strains reason to suggest the issue of whether these plans could continue to be employed was a significant one. If the only issues in this litigation had been the condition of the existing plans and their fitness for continued use, the nearly three week trial which this court presided over could have been effectively reduced to a one hour hearing, if that. Since the issues of the viability of the existing plans and their appropriateness for continued use were not significant issues, the plaintiffs cannot be considered prevailing parties under the standards set forth in *Farrar* requiring a party to succeed on a significant issue.

2

Next, the plaintiffs claim prevailing party status on the issue of impasse. On this issue we conclude that the plaintiffs did not prevail. As mentioned above, the

Republican Party's complaint, filed October 4, 1991, sought an immediate judicial determination that the legislative process was irretrievably deadlocked. The SRAC requested an identical finding in its complaint filed October 31, 1991. The defendants denied the legislative process was deadlocked and moved to have the complaint dismissed on the ground of ripeness. On February 10, 1992, the impasse issue was resolved by a court order declaring an impasse, to which both parties consented.

At the time of the Republican Party's request, there still existed some possibility of a legislative resolution of the redistricting process when the General Assembly reconvened in January. As the Supreme Court stated in *Wise v. Lipscomb:*

> [R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.
>
> . . . .
>
> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan . . . .
>
> 437 U.S. 535, 539-540 (1978) (citations omitted).

Thus, "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an opportunity to do so." *White v. Weiser,* 412 U.S. 783, 794-795 (1973) (quoting *Reynolds v. Sims,* 377 U.S. 533,

586. (1964)). Therefore, in October of 1991, South Carolina's redistricting process was not technically at an impasse because the process still held some hope of a legislative solution.

With an eye toward affording the legislature every opportunity to perform its redistricting responsibilities, this court postponed a decision on the request for a finding of impasse until January of 1992 and later to February of that same year. In the interim, plans for the Senate and House were passed, but vetoed by the Governor and those vetoes were sustained. No congressional plan was passed. Thus, it is imminently reasonable to conclude South Carolina's attempt at redistricting itself was not at an impasse in October of 1991 since a legislative resolution could be achieved as evidenced by the discernable, although not dispositive, process made by the General Assembly after their return in January of 1992.

We are therefore confronted with the question of whether the parties' agreement and subsequent court finding of impasse on February 10, 1992, qualifies the plaintiffs as prevailing parties. We find that the resolution of the impasse issue was a procedural finding amounting to little more than a determination of ripeness by the court. At most, our finding that an impasse existed was an interlocutory ruling that allowed the case to proceed to trial at the time it did. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (denying attorney's fees when "[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim"). Our finding that an impasse existed in no way affected the merits. In fact, the

finding of impasse was purely a procedural victory opening the door that eventually led to a rejection of the plans proposed by the plaintiffs. Therefore, because the impasse issue was not significant and the agreement failed to change the legal relationship between the plaintiffs and the defendants, we find that the plaintiffs are not prevailing parties on the impasse issue.

Furthermore, although a meaningful participant in other areas of this litigation, the SRAC was not the motivating force behind the court's finding of impasse. The eventual resolution of the impasse issue was dictated and determined by the court and the calendar more so than by the efforts of one of the parties. The SRAC was not the first party to raise the impasse issue or seek relief. Instead, the SRAC merely joined in the Republican Party's argument. In this court's considered opinion, the fee statutes were not passed to compensate parties who perfunctorily join in motions, particularly when the motions in question are of procedural import in the first instance. In addition, since the Republican Party is not a prevailing party on the issue of impasse, it would defy logic to find that the SRAC was a prevailing party.

3

Finally, the plaintiffs claim prevailing party status on the basis of the plans which eventually emerged from this process. In particular, the Republican Party claims to have been a catalyst in the court's decision to draw a minority opportunity district in South Carolina's Sixth Congressional District. None of the parties, however,

opposed the creation of some form of minority opportunity district in South Carolina. In fact, every plan offered at trial, including defendants', contained such a district.

Similarly, the SRAC claims it is entitled to fees as a prevailing party for the adoption of new plans for the Senate, House, and Congress irrespective of authorship. Specifically, counsel for the SRAC states the court "has granted Plaintiff[ ] SRAC relief on a significant issue presented in this litigation by adopting and creating plans for the redistricting of South Carolina's Senate, House of Representatives, and congressional districts. It is clear, therefore, that Plaintiff[ ] SRAC has prevailed in this action and achieved significant relief." SRAC's Petition for Attorneys' Fees at 3. This is certainly a curious explanation of the process in light of the fact that the SRAC appealed the very order which redistricted the state's legislative bodies. Either the SRAC was dissatisfied with the court's plans, which would raise doubts about its alleged "prevailing party" status, or its initial objective was merely for new plans to be drawn irrespective of authorship, which makes the SRAC's complaint superfluous since the Republican Party had already filed suit requesting new plans.

The obvious motive and goal of the plaintiffs was to get their plan adopted by the court. As this court made abundantly clear in the underlying order, the plans presented by the parties suffered a myriad of infirmities. In addition, we emphasized the plans we fashioned were

our own and did not remotely resemble the plans proposed by either plaintiff.[3] The only factors the court considered in fashioning its plan for South Carolina's Congressional districts were the federal and statutory requirements for congressional plans and South Carolina's state policies, provided those policies were consistent with the federal requisites. In truth, the testimony heard by the court was of little help in creating its plan. It should be noted the Republican Party proposed no Congressional plan and instead supported the plan offered by Governor Campbell. Thus, it cannot be credibly asserted that the plaintiffs "prevailed" in the creation of the interim plans this court ordered or more specifically, that the Republican Party prevailed in this court's creation of a minority opportunity district.

IV

The plaintiffs next contend that they have prevailed in litigation concerning the special election to replace Senator Macaulay in Senate District One. We agree.

As mentioned above, in 1994 a special election was ordered to replace Senator Macaulay in Senate District One. On July 20, 1994, the Senate requested a court order that the court-drawn lines used in 1992 also be used in the special election. The plaintiffs asked the court to

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[3] While this court does not find the plaintiffs to be prevailing parties on this issue, the court does not adopt the reasoning in *Hastert v. Illinois State Bd. of Election Com'rs*, 28 F.3d 1430 (7th Cir. 1993). In *Hastert*, the Seventh Circuit held that the touchstone for whether a party prevails is whether their map is ultimately adopted. *Id.* at 1443.

require the state to obtain preclearance of the 1992 lines from the DOJ. The Senate argued that court-drawn plans did not require preclearance under § 5 of the Voting Rights Act. The plaintiffs took the position that the adoption of the court's plan by the Senate was an act of legislative judgment, and therefore, the party-sponsored plan had to be submitted to the DOJ for preclearance, even if that plan adopted a prior court-ordered plan. The plan was submitted and received preclearance from the DOJ on December 12, 1994.

We are now faced with the question of whether the plaintiffs' success in obtaining a court order requiring preclearance of the 1992 district lines qualifies the Republican Party and the SRAC as prevailing parties. We find that the plaintiffs' success on this issue does qualify them as prevailing parties. Pursuant to *Farrar*, a prevailing party "must obtain an enforceable judgment against the defendant from whom fees are sought . . . " *Farrar*, 113 S. Ct. at 573 (citing *Hewitt*, 482 U.S. at 760). Here, the court order requiring the Senate to obtain preclearance was enforceable by the Republican Party and the SRAC.

In light of the DOJ's subsequent preclearance of the plan, the plaintiffs' victory was pyrrhic at best. While the plaintiffs were successful in having the plan submitted for preclearance, the election ultimately was conducted pursuant to the 1992 plan. The court recognizes that the plaintiffs still qualify as prevailing parties, but cautions that "although the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded." *Farrar*, 113 S. Ct. at 574.

V

The SRAC also has prevailed on another aspect of this litigation. On May 22, 1992, the SRAC filed a notice of appeal to the Supreme Court seeking review of the districting plan ordered by this court. On June 14, 1993, the Supreme Court vacated this court's judgment and remanded the case to this court for "further consideration in light of the position presented by the Solicitor General in his brief for the United States filed May 7, 1993." *SRAC v. Theodore,* 113 S.Ct. 2954 (1993). But the result of the vacatur was somewhat less than clear.

While the Supreme Court vacated and remanded the judgment of this court, the Court did not expressly vacate the lines drawn by this court. In addition, the elections held pursuant to the 1992 plans were not vacated. Thus, the net result of the SRAC's appeal was that the judgment was vacated, but all actions conducted pursuant to the judgment were untouched.

Nevertheless, the SRAC did prevail in having the judgment vacated. Even though the effect that vacating the judgment would have on the parties was unknown at the time, the SRAC had obtained an enforceable judgment. As such, remanding the case for further consideration in light of the Solicitor General's position was a direct benefit for the SRAC. Indeed, according to *Farrar,* this success qualifies the SRAC as a prevailing party as "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment." 113 S. Ct. at 573. Therefore, while the benefit was minor, it was sufficient to qualify the SRAC as a prevailing party on this issue.

VI

In summary, this court finds that: (1) both the Republican Party and the SRAC are prevailing parties on the litigation surrounding Senate District One, and (2) the SRAC is a prevailing party for obtaining the Supreme Court order vacating our judgment in *Burton v. Sheheen*. Having found the plaintiffs to be prevailing parties, the issue of attorneys' fees must be considered. The court cautions that "a determination that a party has 'prevailed' . . . means only that fee claimants are eligible for attorneys' fees. The court must then consider whether a fee award would be 'unjust' under the particular circumstances." *Medina*, 683 F.2d at 442. The fee award statutes "expressly grant[ ] district courts' discretion to withhold attorney's fees from prevailing parties in appropriate circumstances." *Farrar*, 113 S. Ct. at 577 (O'Connor, J., concurring). Indeed, 42 U.S.C. § 1973*l*(e) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

The " 'most critical factor' in determining the reasonableness of a fee award 'is the success obtained' " by the prevailing party. *Farrar*, 113 S. Ct. at 574 (quoting *Hensley*, 461 U.S. at 436). As stated above, while "the 'technical' nature of a nominal damages award, or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded." *Id.* As such, "in some circumstances, even a plaintiff who formally 'prevails' . . . should receive no attorney's fees at all." *Id.* at 575. Therefore, the court must examine the overall success of the Republican Party and the SRAC as "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award. *Id.* at 574.

A

Both the Republican Party and the SRAC prevailed in the litigation surrounding Senate District One. Upon review, this victory is *de minimis* or pyrrhic at best. The outcome of that dispute was that the court required the Senate to submit the 1992 districting plans to the DOJ for preclearance. While the plaintiffs were successful in obtaining the submittal, the fact that the DOJ precleared those very same 1992 lines for use in the special election makes the plaintiffs' success facial and *de minimis*.

B

In addition, the SRAC's success in obtaining a Supreme Court order vacating our order and remanding the case to this court for further consideration is also merely technical and *de minimis*. In essence, what the SRAC achieved was a situation where the Supreme Court's order vacated the judgment, but left undisturbed the actions performed under the judgment. Indeed, the Supreme Court did not invalidate the 1992 Senate elections held pursuant to the vacated court order. And, in addition, the period whereby the court-drawn plan ceased to exist was short-lived. In 1994, the General Assembly passed a House of Representatives' act which became law and later was precleared for use by the DOJ. Also in 1994, a plan for the congressional districts was passed and precleared. Then, in 1995, a Senate Act became law and was also precleared. In the meantime, as evidenced in the Senate District One litigation, the DOJ precleared the 1992 plans for use in various elections.

Therefore, the SRAC's success as a prevailing party was purely technical in nature and *de minimis*.

The court admits that "prevailing plaintiffs 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Hastert*, 28 F.3d at 1439. (quoting S. Rep. 925, 94th Cong., 1st Sess. 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807 (addressing § 1973*l*(e)); S. Rep. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (addressing § 1988)). However, in this case the *de minimis* nature of the plaintiffs' success is undeniably a special circumstance. As Justice O'Connor stated in her concurring opinion in *Farrar*, "When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded." 113 S. Ct. at 576. Indeed, " 'a technical victory may be so insignificant' . . . as to be insufficient to support an award of attorney's fees." *Id.* (quoting *Garland*, 489 U.S. at 792). Therefore, upon consideration of the technical and unremarkable success of the prevailing plaintiffs the court is compelled to award no attorneys' fees to either the Republican Party or the SRAC.

After evaluating the magnitude, or lack thereof, of the prevailing parties' success, "the court may lawfully award low fee or no fees without reciting the 12 factors bearing on reasonableness or multiplying 'the number of hours reasonably expended . . . by a reasonable hourly rate.' " *Id.* at 575 (quoting *Hensley*, 461 U.S. at 433, 103 S.Ct. at 1939). In addition, Justice O'Connor has stated:

> As a matter of common sense and sound judicial administration, it would be wasteful indeed to require that courts laboriously and mechanically go through those steps when the *de minimis*

> nature of the victory makes the proper fee immediately obvious. Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to 'award low fees or no fees' at all.
>
> *Id.* at 576 (quoting *Id.* at 575).

In this case, the above discussion explains why we find the success of the plaintiffs to be *de minimis*. For those reasons stated, we find that the reasonable fee is no fee at all.

VII.

To conclude, we find that neither the Republican Party nor the SRAC are entitled to attorneys' fees pursuant to 42 U.S.C. §§ 1973*l*(e) and 1988. While each plaintiff was a prevailing party on minor issues, their success was too technical or *de minimis* to justify an award of attorneys' fees. Therefore, the petitions of the Republican Party and the SRAC for attorneys' fees must be denied.

IT IS SO ORDERED this 15th day of December, 1995 at Columbia, South Carolina.

ENTERED for the court, with the concurrence of Judge Anderson and Judge Hawkins.

/s/ Clyde H. Hamilton
CLYDE H. HAMILTON
UNITED STATES
CIRCUIT JUDGE
FOURTH CIRCUIT COURT
OF APPEALS